

REMARKS

Enclosed herewith are three sheets of drawing to replace the three sheets of informal drawing that were a part of the application as filed. In new Fig. 2, the targets are now designated "72" as they are in new Fig. 1. It is submitted that this change removes the ground of the objection to the drawing that is set forth in the first paragraph on page 2 of the Office Action.

As required by the Examiner, applicant has amended the specification to correct the informalities that were kindly pointed out by the Examiner.

The Examiner is asked to withdraw the rejections of the claims under 35 U.S.C. §101 and 35 U.S.C. §112, second paragraph. It is submitted that claims 1-10 are drawn to statutory subject matter and comply with the second paragraph of 35 U.S.C. §112.

Specifically, the Examiner has objected to the language of "said bottom opening and said cavity being sufficiently large to receive the head of a person" appearing on lines 6 and 7 of claim 1. It is submitted that this reference to "the head of a person" is a proper way of expressing a dimension in a claim. It does not amount to claiming "the head of a person."

In *Ex Parte Jones*, 84 USPQ 24, 25 (P O Bd App, 1949), the claim at issue specified "an occipital clamp curved to fit the occipital region of the head," and "an extensible member extending from said support across the body of the patient from rear to front," etc. The Examiner rejected the claims on the ground that they were indefinite because they recited the relation of the clamp parts to each other through their relation to the patient's head, neck, face or body. The Board reversed the Examiner and stated:

We think that the claims before us define the combination of elements with sufficient particularity, considering the art which it pertains, and the facts that we have noted, so that they may be compared to the prior art with the purpose of ascertaining whether or not it is anticipated, and therefore we think that the ground of rejection is unattainable.

The Board further stated that:

[I]t has long been the practice of Patent Office, as well be seen by the reference to the patents called to our attention by applicant, to permit devices for applications to anatomy to be referred to normal anatomy to assist in defining the orientation of the parts. We cannot say that this is improper. Admittedly, direction and distances are not precisely determined in this manner, but this art does not ordinarily require the same precision as the same machine tool art for example.

In *Ex Parte Wolfskill*, 97 USPQ 176, 178 (PO Bd App, 1953), a claim was rejected as being indefinite because it had mentioned a part of a machine by reference to elements on which they operate. Specifically, the machine was a “lap”. The claim specified a “guide member having a thickness equal to several times the thickness of the crystal blank”. The Board stated:

We believe that a reference to such an unclaimed device or element for comparison purposes would be a convenient and desirable means to indicate the dimension of a part claim, especially when such a dimension is not critical. In this instance, we do not deem the dimension to be critical. We, therefore, do not sustain this ground of rejection.

In *Schick Drive Shaver Inc. v. R.H. Macy & Co., Inc.*, 45 USPQ 454, 457-58 (2d Cir. 1940), it was argued that the claims were indefinite because they expressed differences in terms of thickness of hair. The Court rejected this argument and stated that the manner of claiming under question is “perhaps, the exact opposite of vagueness and uncertainty.” The Board further stated that “to express minuet distances in terms of the breadth of a hair is not uncommon.” “The specifications are to be read fairly in connection with the claims and a reasonable construction given to the language used to the end that whatever invention is actually disclosed and claimed will be protected.” The Board then stated that, “when so read the language is as definite as the law requires.”

It is submitted that defining the sizes of the bottom opening and cavity in claim 1 by reference to a person’s head is the “exact opposite of vagueness and uncertainty.” A person of ordinary skill in the art would from the reference to “the head of a person” be able to select a size for the bottom opening and the cavity that will result in a water toy that can be used in the manner illustrated in Fig. 7. As stated in *Jones and Wolfskill*, the dimensions of the bottom opening and the cavity do not require precision. They are not critical. What is important is that a person using the water toy be able to place his/her head through the bottom opening and into the cavity in position to place that person’s eyes in alignment with at least one sight opening.

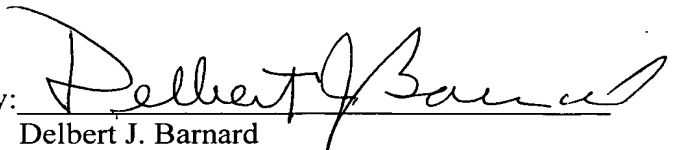
If a water toy constructed as claimed is sized so that the head of at least one person can be inserted through the bottom opening into the cavity, in a position to see through the sight opening, that is all the claim requires.

For the reasons set forth above, the Examiner is requested to withdraw the rejections under 35 U.S.C. §101 and §112, second paragraph.

It is submitted that claims 1-10 are all patentable. Early reconsideration and allowance of the application are requested.

Respectfully submitted,

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